

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order.

Application 04-03-014
(Filed March 10, 2004)

**ADMINISTRATIVE LAW JUDGE'S RULING
REGARDING RESUMPTION OF ARBITRATION AND
ESTABLISHING INITIAL SCHEDULE**

Verizon California Inc. (Verizon) filed this petition for arbitration (Petition) more than a year ago in an effort to implement change of law provisions emanating from the Federal Communications Commission's (FCC) Triennial Review Order (TRO)¹ and the subsequent Circuit Court of Appeals Decision addressing it (*USTA II*).² The arbitration named more than 140 competitive local exchange carriers (CLECs) as parties to the arbitration, virtually all the CLECs with which Verizon had interconnection agreements subject to Sections 251 and 252 of the Telecommunications Act of 1996 (TA 96).

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003).

² *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), cert. Denied, *NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 and 04-18 (U.S. Oct. 12, 2004).

While the petition for arbitration referenced both the TRO and *USTA II*, it stated its proposed amendments were prepared prior to *USTA II*. (Petition at 2.) On March 19, 2004, Verizon filed a document denominated “Amendment to Petition for Arbitration of Verizon California Inc.” which amended portions of the Petition to reflect additional changes Verizon believed necessary as a result of the *USTA II* decision. However, even Verizon acknowledged that some further modifications might be necessary. Verizon stated: “In addition, although Verizon’s amendment is intended to implement the unbundling rules reflected in the Triennial Review Order, it also recognizes the possibility of changes in Verizon’s unbundling obligations under federal law. As such, Verizon expects that any revisions necessary to conform the amendment to changes in federal law during the course of this proceeding (either because of issuance of the court’s mandate or further litigation in the D.C. Circuit or Supreme Court) will be relatively minor.”

The *USTA II* decision created a number of uncertainties. The decision found significant problems with major portions of the TRO, particularly with respect to the role given to states in undertaking an unbundled network element (UNE) impairment analysis and remanded the proceeding back to the FCC.

One CLEC, NII Communications, filed a request for dismissal premised on its contention that, at least with respect to NII, Verizon had not followed the proper procedure for initiation of negotiations with NII, a prerequisite to filing a petition for arbitration.

Following those filings, I issued a ruling that did two things. First, it extended the time for the named CLECs to file their responses until a date to be set. Second, it inquired of Verizon and the named CLECs as to why the arbitration should not be dismissed without prejudice until such time that

negotiations on all interconnection agreement modifications related to implementation of the TRO could be addressed following the conclusion of litigation concerning the TRO. (ALJ Ruling, March 29, 2004.)

In addition, there was also in progress at that time a generic Commission proceeding to implement TRO provisions, specifically examining state specific factual questions (referred to as a “granular analysis”) as to impairment or non-impairment for various unbundled network elements as requested by the FCC. This proceeding, designated as a phase of the Commission’s local competition rulemaking/investigation, R.95-04-043/I.95-04-044, had both a “90 day phase” and a “9 month phase.” In addition, it addressed the generic question of “batch hot cuts” for transfer of services from switching purchased by a CLEC as a UNE to the CLEC’s own switch, based on the expected determination that mass changes from incumbent local exchange carriers’ switches to CLEC switches would need to be accomplished. It was anticipated that this proceeding, directly and through its input to the FCC’s TRO process, would impact some of the matters raised in the Petition. This proceeding was initiated as a result of the TRO and was, ultimately, significantly impacted by *USTA II* and process changes adopted by the FCC in response to *USTA II*.

Responses to that ruling were received from Verizon, AT&T Communications (AT&T); WorldCom (MCI); Sprint Communications Company L.P and Cox Communications PCS L.P. dba Sprint Spectrum (jointly); the Competitive Carrier Coalition;³ the Competition Carrier Group;⁴ Cricket

³ Jointly representing ACN Communication Services, Inc.; Adelphia Business Solutions Operations, Inc. dba TelCove; Allegiance Telecom of California, Inc.; DSLnet Communications, LLC; Focal Communications Corporation of California; ICG Telecom

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Communications, Inc.; and Anew Telecommunications Corp. dba Call America, DMR Communications, and Tri M Communications Inc. dba TMC Communications.

Virtually all of those responding suggested that the proceeding be dismissed until litigation surrounding the TRO was resolved, contending that it was premature. MCI alone supporting moving forward, with issues limited to those identified in the original petition. The Competitive Carriers Group suggested that the docket remain open as a good vehicle to address the number of issues for so many carriers, but also suggested a Commission ruling directing the maintenance of the status quo for all existing interconnection agreements. Several contended that real negotiations had not yet taken place and should be pursued.

Verizon filed reply comments to the responses on April 19, 2004. Verizon contended that the FCC mandated the TRO the process it was following – that local exchange carriers are to use § 252 as the default timetable for amending interconnection agreements that are silent regarding change of law or transition timing. Verizon contended it had substantially followed the requirements of § 252 of TA 96 and the Commission's rules for related arbitrations, particularly considering the unique situation presented by the TRO and related litigation. Verizon rejected claims that merger conditions imposed by the Bell Atlantic/GTE

Group, Inc.; McLeodUSA Telecommunications Services, Inc.; Mpower Communications Corp.; Pac-West Telecomm, Inc.; PAETEC Communications, Inc; RCN Telecom Services of California, Inc.; and Vycera Communications, Inc.

⁴ Jointly representing Bullseye Telecom Inc; Comcast Phone of California; Covad Communications; Global Crossing Local Services, Inc.; IDT America Corp.; KMC Telecom V, Inc.; Winstar Communication, LLC; and XO California, Inc.

merger (which created Verizon) had any present applicability to this arbitration request. Verizon rejected claims that the TRO was in sufficient flux to not allow the arbitration to go forward on all of the issues it had raised and it urged that CLECs in particular situations, specifically those whose interconnection agreements do not require provision of UNEs, should be dismissed from the arbitration.

At the same time, Verizon filed a stipulation dismissing Nextel of California Inc. from the arbitration.

MCI was the only CLEC to also file reply comments. MCI objected to the positions of the other CLECs that the arbitration should either be dismissed or otherwise held in abeyance, contending that MCI was entitled to have the arbitration of its interconnection agreement with Verizon go forward, albeit limited to the issues raised in the original petition and not the amendment.

On May 6, 2004, Verizon itself filed a motion to hold the arbitration in abeyance until June 15, 2004, the date by which the D.C. Circuit's mandate in *USTA II* was scheduled to issue⁵ and to avoid interference with the commercial negotiations suggested by the TRO. Verizon indicated its intent to use the time to pursue negotiations, without the distraction of the parallel arbitration. It stated that shortly after the *USTA II* decision became effective on June 15, 2004, it would propose a procedural schedule for the resumption and completion of this proceeding.

⁵ The D.C. Circuit had itself stayed the effectiveness of its *USTA II* decision for 60 days, to May 3, 2004. The FCC and the United States filed a motion requesting a further 45-day stay to facilitate carrier negotiations. The court granted the motion, extending the stay to June 15, 2004.

Various CLECs (AT&T, Anew, DMR, TRI-M, MCI, Sprint, the Competitive Carrier Group, and the Competitive Carrier Coalition) filed responses to the Verizon motion. Most, generally, did not oppose the abeyance request, as long as there were assurances of no unilateral action by Verizon to alter the availability of then-available UNEs during the abeyance and resumed arbitration period. MCI filed a partial opposition to Verizon's request to hold this arbitration in abeyance. While MCI concurred with Verizon's request with respect to issues affected by the *USTA II* decision, MCI requested that the arbitration go forward with respect to issues unaffected by the decision and that the Commission act to preserve the availability of UNEs impacted by the TRO and *USTA II* to avoid the risk of loss of services. The Competitive Carrier Group also opposed the motion and requested that the arbitration go forward with respect to matters not affected by *USTA II*, while maintaining the status quo as to *USTA II* impacted matters.

On December 2, 2004, Verizon requested that this arbitration move forward based on what was then anticipated to be the content of the expected FCC order addressing the Circuit Court remand. Verizon's "Updated Amendment to Petition for Arbitration and Request for Resumption" (Updated Amendment) included a modification to its arbitration request that is represented to totally replace its earlier arbitration request in all particulars.

At the same time, Verizon also filed a motion to dismiss from the arbitration preceding all but 16 of the more than 140 CLECs previously named. This was premised on Verizon's contention that its "interconnection agreements with the CLECs listed on Exhibit A [those for which it was requesting dismissal] already contain terms permitting Verizon, upon specified notice, to cease providing UNEs that are no longer subject to an unbundling obligation" under

§ 251 and related regulations. (Motion for Leave to Withdraw Petition for Arbitration as to Certain Parties (Withdrawal Motion) at 1). Verizon indicated its intention to comply with the then-existing transition requirement of the FCC interim order issued in response to *USTA II*.⁶

On or about December 17, 2004, a number of CLECs responded to Verizon's request for resumption as well as its motion to dismiss various CLECs.

With regard to the request for resumption, AT&T, TCG Los Angeles Inc., TCG San Diego Inc., TCG San Francisco, Inc. and Arrival Communications, Inc. (filed jointly) questioned the appropriateness of suggesting a start in advance of having the final FCC order addressing the *USTA II* remand, the release of which was then anticipated to be imminent. MCI concurred, noting that Verizon had submitted multiple amendments to its arbitration request, in most cases in anticipation of what a decision might say and was doing that again. They even noted the wisdom of the ALJ (a bit of praise rarely seen) in not having this matter go forward while so much was still in flux. Pac-West also noted the inappropriateness of resumption while final FCC rules were still being digested. Airespring, Inc., A+ Wireless, Inc., California Catalog and Technology, Inc., ECI Communications, Inc., Preferred Long Distance, Inc., Telscape Communications, Inc. The Telephone Connection Local Services, LLC, Utility Telephone, Inc., and Wholesale Airtime, Inc. (jointly Airespring et al.) express the same view, noting that Verizon filed its amendment and request for resumption on December 2,

⁶ Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC 04-179 (released Aug. 20, 2004 (Interim Order)).

2004, knowing the FCC was expected to announce its pending rule change on December 15, 2004.

With regard to the request for dismissal, most of the CLECs objected, based on the premise for the dismissal request – that Verizon could unilaterally change the terms of their interconnection agreements and that no negotiation or arbitration process was necessary. MCI and Arrival Communication, Inc. (jointly) objected to the dismissal based on a failure of Verizon to demonstrate any basis on which it could unilaterally alter interconnection agreements and stated that the requirement (or lack thereof) to provide certain services, such as UNEs, was not the only basis on which CLECs might have issues subject to this arbitration. Bullseye Telecom Inc., IDT America Corp and Metropolitan Telecommunication of CA, Inc. (jointly) take the same position. Sprint makes the same assessment and objects to being dismissed, contending that its interconnection agreement does not permit Verizon to unilaterally implement changes of law. Anew, DMR, Navigator Telecommunications, LLC, Netlojix Telecom, Inc., Tri-M objected for similar reasons, also suggesting that even if certain UNEs could be discontinued as a matter of law, there would still be a need for an orderly transition process to make that happen. Airespring et al. takes a similar position. Pac-West's objection to being dismissed acknowledges the element of Verizon's dismissal motion as to the language that allows discontinuance of UNEs no longer required to be offered. However, Pac-West states that its interconnection agreement still require an agreement by the parties to effectuate that change. Pac-West urges denial of the motion and allowed participation by any CLEC that desires to participate in the arbitration.

Pacific Bell Telephone Company, in its capacity as a CLEC, does not object to Verizon withdrawing it from this arbitration, but does not concur with any suggestion it lacks a valid interconnection agreement with Verizon.

As noted by many of the CLECs, at the time of the resumption request, the FCC had not released its order addressing the remand directive of the DC Circuit Court. For that reason, it was somewhat premature to direct that responses to the amended arbitration request be filed.

On December 20, 2004, I issued a ruling by e-mail that allowed Verizon the opportunity to file a reply to the various CLEC responses. However, that e-mail stated that the reply was all that was being authorized at that time. It was not to be construed that a schedule for the resumption of this arbitration proceeding or the filing of substantive responses by CLECs to Verizon's arbitration amendment was being established.

Verizon filed a reply to the various CLEC responses on December 30, 2004. In it, Verizon again requested that the arbitration go forward and challenged the objections to its withdrawal request.

On December 15, 2004, the FCC announced its response to the remand directive. However, consistent with common FCC practice, announcement of a decision is not the same as release of the decision. Therefore, for an extended period the only insights into what had actually been ordered were those contained in the FCC press releases and through various other informal channels of communication. It was not until February 4, 2005, nearly two months after Verizon's resumption request, that the FCC order itself was released. This order

has come to be known as the Triennial Review Remand Order⁷ (TRRO). Among other things this order established a phase out process for the unbundled network element platform (UNE-P) primarily as a result of determining that incumbent LECs have no obligation to provide CLECs with unbundled access to mass market local circuit switching, the treatment of other UNE's, the role of private agreements among carriers and a large number of other topics related to CLEC-incumbent carrier relationships.

Following this release, a number of activities took place in quick succession that relate to the subject of this arbitration request.

Verizon and some CLECs exchanged a series of letters to the administrative law judge. These discussed the potential schedule and protocols for the resumption of this arbitration. Verizon noted the TRRO release and its transition schedule and proposed a schedule for this arbitration to resume, which it suggested start with a 30-day negotiation period, and indicated it would continue to negotiate with CLECs. It stated that no pre-filed testimony or hearings would be necessary since, from its perspective, all the issues were legal in nature. MCI suggested some modifications to the schedule and continued to object to dismissal of parties. AT&T objected to moving forward with this arbitration prior to undertaking the negotiations it contends are contemplated by the TRRO and properly following the change of law provisions directed by the TRRO and the corresponding interconnection agreements. Mpower Communications Corp. and RCN Telecom Services of California (jointly)

⁷ Order on Remand, In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, CC Docket No. 01-338, adopted December 15, 2004, released February 4, 2005.

challenge the ability of Verizon to unilaterally determine what is or is not the subject of this arbitration. They question both the appropriate framing of the arbitration issues by Verizon's Petition and the various amendments, and also state that CLECs have the right to have their issues arbitrated as well.

Following the release of the TRRO, Verizon notified CLECs with whom it has interconnection agreements of a schedule by which it would require CLECs to either enter into agreements with Verizon to address future pricing for access to Verizon switching services or face discontinuance of switching as of a date specific. That date corresponded to the March 11, 2005 effective date for the TRRO.⁸

Various CLECs filed petitions to "maintain the status quo" with respect to the provision of UNE-P services as specified in their interconnection agreements until new arrangements could be negotiated. On March 11, 2005, an Assigned Commissioner's Ruling was issued that maintained the status quo to May 1, 2005, allowing time for and encouraging negotiations among the CLECs and Verizon to resolve the future of UNE-P type arrangements. It stated that only existing arrangements for existing customers would be protected up to the duration of the March 11, 2006 deadline established by the FCC in the TRRO.⁹ On March 17, 2005, the Commission ratified the ACR in Decision (D.) 05-03-027. Similar pleadings and a similar ACR and decision were issued in the

⁸ Pacific Bell, doing business as SBC Communications, provided a similar notice to CLECs with which it had interconnection agreements.

⁹ Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, March 11, 2005.

Commission's local competition docket (R.95-04-043/I. 95-04-044), TRO Phase, with respect to Pacific Bell.

At this point, it seems appropriate that this arbitration go forward, at least in some fashion. The exact structure and schedule of the arbitration are, however, somewhat difficult to firmly determine at this time for a number of reasons.

Verizon's Updated Amendment was filed in response to the FCC's initiation of a rulemaking to address the D. C. Circuit Court's *USTA II* decision. It was premised on Verizon's assertions as to its expectations of what the FCC would necessarily have to do in response to the *USTA II* decision. The actual FCC conclusions, i.e., the TRRO, had not yet been issued. Thus, it is reasonable to ascertain what, if any modifications Verizon might make to its request for arbitration in light of the TRRO and subsequent litigation, including that before this Commission, as well as the results of on-going negotiations.

A number of the CLECs that Verizon suggested be dismissed from this arbitration, object to being dismissed both as to themselves and as to CLECs generally. Their status and that of others needs to be determined.

MCI, Inc. (MCI) and AT&T have been two of the major participants in this arbitration request to date, as well as in many other proceedings addressing Verizon's relationships with its CLECs. Following discussions extensively reported in the press, Verizon and MCI announced they were merging. Application (A.) 05-04-020, to effectuate that merger, was filed with the Commission on April 21, 2005. Similarly AT&T has entered into a merger agreement with SBC Communications. A.05-02-027 was filed at the Commission on February 28, 2005, to effectuate that transaction. These two matters, one directly involving Verizon and one of the largest CLECs and the other involving

the other largest CLEC may have a significant impact on what parties participate in this arbitration, and to what extent, as well as what issues may, in fact, remain necessary to arbitrate.

Finally, in response to the TRRO issuance and the notices provided by Verizon to CLECs with which it has interconnection agreements, the Commission has become aware that some CLECs, to varying degrees and for varying durations, have entered into what are termed by the parties “private” agreements, that resolve partially, on an interim basis, or completely, interconnection relationships.¹⁰

Therefore, in “restarting” this arbitration, I am going to take several steps to ensure that the time of the Commission and the parties is most efficiently spent.

Within 15 days of the issuance date of this ruling Verizon is to file an addendum to its “Updated Amendment” to indicate any changes in its arbitration request or that it has no changes. If changes are substantial, it would be beneficial to the Commission and other parties to have Verizon’s entire

¹⁰ MCI withdrew from the UNE-P status quo maintenance dispute based on reaching an agreement with Verizon. One area of concern is the seeming belief that such “private agreements” are not subject to state commission review and approval pursuant to §§ 251 and 252 of TA 96. To date, carriers have not submitted such agreements for review and approval. No formal determination, however, has been made as to the status of such agreements. There is no explicit provision for them in TA 96, which refers to “a request for interconnection, services or network elements pursuant to section 251” (TA 96 § 252(a)(1)) and that any such voluntary interconnection agreements are to be submitted to state commissions for approval. (TA 96 § 252(e).) As noted, such agreements are not limited to those that address the provision of unbundled network elements.

arbitration request contained in a single document. Verizon shall also indicate whether it believes hearings are required for any of the matters indicated or not.

Within that same time period (15 days for the date of this ruling), Verizon is to provide all carriers with whom it has interconnection agreements with a copy of this ruling and a copy of its complete request or statement of no change. I direct this to ensure that all such carriers that may be affected by this arbitration are advised of its current status and have the opportunity to request either inclusion or exclusion. This is also to ensure that this is an inclusive arbitration to address the TRO and TRRO without the potential for separate arbitrations on related topics. While the Commission may well have information on such interconnection agreements, it will be a more comprehensive process if undertaken by Verizon. Verizon will certify in its updated amendment or statement of no change that such service has been undertaken.

Within 30 days of the issuance of this ruling, all carriers receiving notice of this arbitration are to indicate their intention to participate in this arbitration and their desire to be placed on the service list for this arbitration. They shall do so by providing notice to the Commission's Process Office by e-mail at process_office@cpuc.ca.gov, by fax at (415) 703-2823 or by letter to the Process Office, California Public Utilities Commission, State Office Building, 505 Van Ness Avenue, San Francisco, CA 94102 and the Assigned ALJ. Such notice shall identify the docket number for this proceeding.

Within 45 days of the issuance of this ruling, and as directed in Commission Resolution ALJ-181, all carriers intending to participate in this arbitration shall file responses to the Verizon arbitration request, and indicate any additional matters that they believe may require arbitration and for which matters they believe hearings may be required. The link to Resolution ALJ-181,

for those who do not have it is:

http://www.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/2853.doc

Following those steps an initial arbitration meeting will be set at which time the scope and schedule for this arbitration will be finalized.

Therefore, **IT IS RULED** that:

1. Within 15 days, Verizon California Inc. (Verizon) is to file an addendum to its December 2, 2004 “Updated Amendment” to indicate any changes in its arbitration request or that it has no changes. If it has changes, it shall consolidate its entire current request into a single document. It shall also indicate whether it believes hearings are required for any of the matters indicated or not.
2. Within 15 days, Verizon shall serve on each competitive local exchange carrier (CLEC) with which it has an interconnection agreement a copy of this ruling and a copy of its addendum or statement of no change.
3. Within 30 days of the issuance of this ruling, all CLECs that have interconnection agreements with Verizon are to indicate their intention to participate in this arbitration and their desire to be placed on the service list for this arbitration, by providing notice to the Commission’s Process Office and the Assigned ALJ. The notice shall include the CLEC’s name and that of its representative as well as contact information including address, telephone number and an e-mail address that can be used for notices and service. A service list for this proceeding will be prepared and posted at the Commission’s web site.
4. Within 45 days of the issuance of this ruling, and as directed in Commission Resolution ALJ-181, all carriers intending to participate in this arbitration shall file and serve responses to the Verizon arbitration request, and

indicate any additional matters that they believe may require arbitration and for which matters they believe hearings may be required.

Dated June 1, 2005, at San Francisco, California.

/s/ PHILIP SCOTT WEISMEHL

Philip Scott Weismehl
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by electronic mail to those who provided electronic mail addresses, and by U.S. mail to those who did not provide e-mail addresses, this day served a true copy of the original Administrative Law Judge's Ruling Regarding Resumption of Arbitration and Establishing Initial Schedule on all parties of record in this proceeding or their attorneys of record.

Dated June 1, 2005, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.